



**Attorney General
Betty D. Montgomery**

July 16, 1999

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Magalie Roman Salas
Secretary
Federal Communications Commission
Portals II Building
Room TWA325
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of the Application for Consent for
Transfer of Control to SBC Communications,
Inc. from Ameritech, CC Docket No. 98-141.*

Dear Ms. Salas:

Enclosed please find the original and nine copies of the Comments of the Public Utilities Commission of Ohio in the above referenced docket. Please time stamp and return one copy to me in the enclosed self-addressed stamped return envelope.

Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven T. Nourse".

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of)

The Application for Consent for)
Transfer of Control to SBC)
Communications, Inc. from)
Ameritech.)

CC Docket No. 98-141

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Public Utilities Commission of Ohio ("Ohio Commission") has conducted its own merger approval proceeding regarding the proposed merger of SBC Communications, Inc. and Ameritech Corporation ("SBC/Ameritech"), pursuant to the requirements of Ohio law. The Ohio Commission has kept the Federal Communications Commission ("FCC") apprised of the developments of the Ohio merger approval proceeding, as part of the Ohio Commission's comments and *ex parte* filings in this docket. On April 13, 1999, the Ohio Commission's Opinion and Order in Case Number 98-1082-TP-AMT was submitted for the record in this FCC docket. That order adopted a Joint Stipulation and Recommendation ("Ohio Stipulation") that was adopted by the Ohio Commission to resolve the issues presented by the merger proceeding, which Stipulation was also submitted for consideration by the FCC in its proceeding. On June 9, 1999, the Ohio Commission's Entry on Rehearing was submitted for this record, which upheld the Ohio Commission's decision to adopt the Ohio Stipulation as its decision in the proceeding.

On July 1, 1999, SBC/Ameritech filed a new set of proposed merger conditions that, in many respects, are substantially similar to those contained in the Ohio Stipulation. There are, however, some significant differences between the two sets of merger conditions, and additional issues are presented relating to coordinating the two sets of conditions as applied to the State of Ohio. The Ohio Commission takes no ultimate position as to whether the FCC should accept the proposed conditions as being sufficient to make this merger promote the public interest, provided its concerns can be reasonably addressed. But the Ohio Commission is vitally interested in ensuring that the two sets of conditions (assuming for this purpose that the FCC does adopt the proposed conditions) are administered to maximize the benefit for Ohio consumers. Because the merger will have been approved at the point in time that such administration problems would arise, it is crucial that these issues be clearly addressed on a pre-merger basis.

The Ohio Commission hereby submits comments in response to the July 1, 1999 Public Notice regarding the new merger conditions proposed by SBC/Ameritech.

DISCUSSION

Paragraph 69 of SBC/Ameritech's July 1, 1999 Proposed Conditions ("proposed conditions") begins by recognizing that some of the proposed conditions "may substantially duplicate" conditions imposed under State law. Paragraph 69 continues as follows:

These conditions shall supplement, but shall not be cumulative of, substantially related conditions imposed under state law. Where both these Conditions and conditions imposed in connection with the merger under state law grant parties similar rights against SBC/Ameritech, affected parties shall not have a right to invoke

the relevant terms of these Conditions in a given state if they have invoked a substantially related condition imposed on the merger under state law.

While this provision is understandably crafted generically to apply to any State merger approval proceeding, the Ohio Commission is aware that the Ohio Stipulation is the only such set of conditions that currently exists. Thus, the Ohio Commission has a unique interest in ensuring that the proposed conditions are applied fairly to the full benefit of Ohio consumers.

In any event, there are significant ambiguities in the practical application of Paragraph 69. As a result, Paragraph 69 and related issues must be clarified by the FCC, in considering whether to adopt SBC/Ameritech's proposed conditions. The pre-existing Ohio Stipulation should not be used in any way to limit the projected benefits of the new proposed conditions for Ohio consumers. Rather, it is only fair that the conditions resulting from the Ohio proceeding be effective independent of any FCC-imposed conditions. Conversely, any FCC-imposed conditions must fully benefit Ohio consumers without being diminished or altered. In short, Ohio consumers must receive the full benefits of both sets of conditions.

Paragraph 69 suggests that the proposed conditions are not cumulative to the Ohio Stipulation, and concludes that carriers must elect to invoke "substantially related conditions" *either* under the proposed conditions or under the Ohio Stipulation—but not both. There are two important points that need to be addressed in this context. First, Paragraph 69's use of vague phrases such as "substantially related conditions" and "similar rights" is subject to uncertainty, at best, and is subject to abuse, at worst. Second, there is no reason why two related but distinct commitments made by

SBC/Ameritech (one before the FCC and one before the Ohio Commission) should be made into an "either or" choice for competitors or consumers.

The Ohio Commission proposes that the FCC clarify these potential problems as follows. The FCC should make it clear that, absent a *direct conflict* between any FCC-imposed merger conditions and a State-imposed merger condition, SBC/Ameritech must fully perform all of their respective obligations at both the federal and state level. For example, there is no reason that SBC/Ameritech cannot perform both the OSS provisions being proposed before the FCC and the OSS provisions found in the Ohio Stipulation. Some of the terms in those two separate commitments could be characterized as "substantially similar" and generally address the same subject matter of OSS. But, it would be profoundly unfair and unlawfully intrusive of Ohio law to conclude that an FCC-imposed merger condition relating to OSS somehow preempts or negates the distinct OSS provisions that were so recently bargained for and agreed to by SBC/Ameritech in order to gain the Ohio Commission's approval of the merger.

While the proposed FCC conditions may change (if adopted) the regulatory landscape for several important local telephone competition issues and would alter the context in which the terms of the Ohio Stipulation are discharged by SBC/Ameritech, the obligations remain in tact and are fully enforceable. For example, the Ohio Stipulation provides for a single OSS penalty of \$20 Million if at least 79 performance measurements and related standards/benchmarks are not implemented by a certain date; whereas, the OSS penalties proposed before the FCC appear to be limited to \$10 Million and are triggered by different events and performance measurements structured entirely differently than those agreed to in Ohio. SBC/Ameritech must be

required to meet each set of merger conditions independent of any other lawful set of conditions.

These two sets of penalties must operate independently and each penalty does not overlap, limit or count toward the other. It is the package of commitments found in the Ohio Stipulation that caused the Ohio Commission to approve the proposed merger, and those commitments serve as the basis for the Ohio Commission's approval as required by Ohio law.¹ If those commitments are substantially modified or superceded, then the Ohio Commission may have to revisit or simply withdraw its approval of the merger.

The easier course is to ensure that SBC/Ameritech fully performs the obligations of both the Ohio Stipulation and any FCC-imposed conditions, unless performing under both is truly an impossibility. The sole exception to this principle relates to the rate discounts. The Ohio Commission will agree that the rate discounts in the Ohio Stipulation need not be compounded by any FCC-imposed rate discounts. Instead, the carrier or customer affected should be permitted to obtain the best possible rate discount at any given time, whether the best discount is based on the Ohio Stipulation or an FCC-imposed merger condition.

¹ By enacting Ohio Revised Code Section 4905.402, the Ohio General Assembly has required that the Public Utilities Commission of Ohio review transactions such as the proposed SBC/Ameritech merger. The Ohio Commission was required as a matter of State law to ensure that the proposed SBC/Ameritech transaction would "promote public convenience and result in the provision of adequate service for a reasonable rate. . ." The result of that process was the Ohio Stipulation being discussed in these comments. There is clearly no basis whatever to conclude that a federal merger review proceeding such as that being conducted by the FCC can modify, undo or otherwise preempt the public commitments and benefits reached as a result of a merger review proceeding conducted under State law. Due to the prior completion of the Ohio merger proceeding, the FCC must now take affirmative measures as part of its proceeding not to infringe on the pre-existing result required by, and achieved under, Ohio law.

For example, the Ohio Stipulation establishes a flat promotional rate of \$5.34 for residence UNE loops across access areas B, C and D. In some access areas, this rate of \$5.34 may be a better rate than the rate produced by the 25% discount being proposed by SBC/Ameritech in the FCC proceeding. In other cases, it may be possible that the 25% discount would produce a rate less than \$5.34. The requesting carrier should be permitted to take the better deal on a customer-by-customer basis, without restriction as to switching to a different rate discount later. Thus, if the FCC-imposed promotional period is closed based on one of the defined triggering events, the carrier could then switch to the discounted rate under the Ohio Stipulation, or vice versa. In short, as long as one of the available discounts is being offered and creates the best deal for that carrier, it should be offered by SBC/Ameritech.

If there is a direct conflict between an FCC-imposed merger condition and a State-imposed merger condition, then SBC/Ameritech obviously will only be able to comply with one of the conditions and not both. In the spirit of federal-state cooperation, the Ohio Commission urges the FCC to minimize the potential for conflict between the two sets of merger conditions by making it clear that the proposed conditions do not preempt or limit any authority or jurisdiction of State commissions. The mere fact that SBC/Ameritech propose a merger condition in the FCC proceeding does not convey exclusive jurisdiction over the related topic area to the FCC.

Only the Communications Act, as amended by the 1996 Act, can define the parameters of the dual jurisdictional system for regulation of telephone service within the United States. Thus, it is imperative that the FCC clarify that the various provisions within the proposed conditions that contemplate an FCC order or FCC enforcement

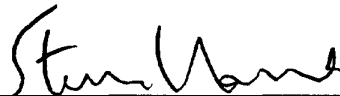
proceedings do not, in and of themselves, purport to modify or affect the jurisdictional federal-state balance established by law. In other words, the FCC should expressly acknowledge in this context that State commissions may have authority to impose additional regulatory requirements regarding matters that are addressed in the proposed conditions (which, if accepted, will ultimately be contained in the merger approval order of the FCC). For example, the Ohio Commission may proceed with the OSS collaborative established in the Ohio Stipulation and may issue orders against Ameritech, independent of the status or developments of the FCC-imposed OSS condition.

CONCLUSION

The Ohio Commission urges the FCC to implement these comments as part of its decision in this proceeding.

Respectfully submitted,

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Attorney General



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